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IN THE
Supreme Court of the United States

No. 79-2031

INSURANCE COMPANY OF
NORTH AMERICA — PETITIONER

VS.

JOE TERRY POYNER and
ERMA WERKE GMBH — RESPONDENTS

POYNER'S BRIEF IN RESPONSE TO THE PETITION FOR CERTIORARI OF INSURANCE COMPANY OF NORTH AMERICA

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I. COUNTERSTATEMENT OF THE FACTS

Poyner's claim against Insurance Company of North America is a suit upon a judgment against INA's insured, Erma Werke GMBH. No one contests service of process or jurisdiction as to Insurance Company of North America (hereinafter referred to as INA). INA, as a matter of affirmative defense, is collaterally attacking a judgment obtained by Poyner

against a German manufacturer of cheap 22 caliber handguns. As such, INA bears the burden of proof in satisfying the Court it is entitled to prevail on its Motion for Summary Judgment. Thornberry v. Timmons, Ky., 406 S.W.2d 151 (1966); Ringo v. Commonwealth, Ky., 455 S.W.2d 49 (1970).

Erma Werke GMBH, the German handgun manufacturing concern, is a type of German corporate entity, wholly owned by an American parent corporation Lear Siegler, Inc. The facts of this relationship are more fully described in the reported decision of Poyner v. Lear Siegler, Inc., 542 F.2d 955 (6th Cir. 1976, pet. for cert. den.)

Joe Terry Poyner's cause of action against Erma Werke GmbH arose in 1968. Mr. Poyner, then 16 years of age, was

rendered a permanent paraplegic when one of Erma's 22 caliber handguns discharged its piece of lead into his spine.

L. A. Distributors, Inc., a New York importer, was, at that time the exclusive United States importer of Erma's weapons. This was a fact of which Erma was well aware, and trade which Erma was actively seeking to maximize. INA claims in its Petition that this exclusive distributorship arrangement did not occur until 1973. This is mistaken. The District Court, in thorough opinion outlined very carefully the contacts of Erma with L. A. Distributors and their contacts with Kentucky. This portion of his Opinion is found in the Petitioner's Appendix, pages A4-A9. As noted by District Judge Gordon, correspondence from the American attorneys representing Erma's interest in

the United States (see District Court Opinion, page A6), describes L. A. Distributors "as Erma's current exclusive United States importer . . ." (A8) This was in 1968, the year of plaintiff's accident; the year before suit was filed and process issued; and four years before the judgment against Erma was entered. Correspondence between officers of Erma Werke and Lou Imperato, the owner of L. A. Distributors, in February of 1968, disclosed that as early as November of 1967, there was discussion at Erma board meetings of L. A. Distributors purchasing Erma. This sale did not come to pass. This same correspondence directed the German manager of Erma "to come back to you (owner of L. A. Distributors) to resolve any agreement needed for a continuing distribution of Erma's sport

weapons in the United States." A second letter to Erma's German manager from one of Erma's American lawyers, also dated 1968 reflects:

> ". . . In response to the casualty company's inquiry, it was stated that Erma did not have assets or property in the United States, that Erma's only United States outlet was the independent New York based importer, Lou Imperato, (L. A. Distributor's owner) and that the sale of shipments of Erma products to the United States were completed outside of the United States; namely, paid for and delivered to Mr. Imperato in Hamburg, Germany. . . ." (Lear Siegler, Inc. v. Joe Terry Poyner, App., p. 116) (parenthetical remarks and emphasis ours)

In short, while the sales may have been "made" in Germany, they were made directly to Erma's "exclusive United States distributor -- L. A. Distributors (owned by Lou Imperato). As counsel for petitioner discusses, this arrangement was still in effect in 1973.

Erma Werke GMBH, at its corporate office in Dachau, West Germany received actual service of process pursuant to the technical requirements of KRS 454.210 on August 11, 1969. A proper return, signed by the recipient at Erma, was made and is in the Court file in this case. Thus, petitioner's repeated assertions of "attempted" service of process are inaccurate. There may be an issue whether that service of process was efficacious; the actual receipt by Erma of the notice, summons and complaint is not disputed.

L. A. Distributors, the New York importer who was the exclusive distributor for the United States of Erma's pistols, sold goods in Kentucky. LA Distributors sold to a distributor in Lexington, Kentucky. LA Distributors

directly solicited business in Kentucky through mail order catalogs, phone calls, and at national sporting goods conventions in Chicago. L. A. further advertised Erma's pistols in magazines of nationwide circulation. L. A. Distributors had a warehouse in North Carolina and an employed salesman in Tennessee, with which the State of Kentucky shares a common border for hundreds of miles.

It is asserted in the petition thatplaintiff's complaint against Erma did not assert a claim for breach of warranty. We disagree. So does the District Court. In Judge Gordon's words:

> "Plaintiff's complaint, filed some eight year ago, alleged both negligence and breach of warranty against Erma in the manufacture of a pistol. . . ." (Petition for Certiorari, A3) (emphasis ours)

II. IT DOES NOT VIOLATE DUE PROCESS TO HOLD A MANUFACTURER SUBJECT TO SUIT FOR ITS DEFECTIVE PRODUCTS IN A JURISDICTION WHERE IT, DIRECTLY OR INDIRECTLY, HAS SOUGHT TO MAXIMIZE THE SALE OF ITS PRODUCTS.

As stated in this Court's very recent pronouncement, World-Wide Volkswagen Corp. v. Woodson, ____ U.S. _____, 62 L.Ed.2d 490, 100 S.Ct. ____ (1980):

> ". . . Hence if the sale of a product of a manufacturer or distributor such as Audi or Volkswagen is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve, directly or indirectly, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or to others. The forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State. Compare Gray v.

American Radiator & Standard Sanitary Corp., 22 Ill 2d 432, 176 NE2d 761 (1961)." Id at 501, 502 (emphasis ours)

While the Court, in World-Wide Volkswagen Corp., supra, so stated, its holding was with respect to a local retailer in New York and a three-State distributor of the product. As noted by footnote 3, 62 L.Ed.2d 496, neither the German-based manufacturer nor the United States importer even sought review of the Oklahoma Court's jurisdiction over them. In the present case, Poyner, we are dealing with the German manufacturing concern itself. The above-quoted stated from World-Wide Volkswagen Corp., supra, is in keeping with the weight of authority in the lower courts. See: Duple Motor Bodies, Ltd. v. Hollingsworth, 417 F.2d 231 (9th Cir., 1969); Honeywell, Inc. v. Metz

Apparatewerke, 509 F.2d 1137, (7th Cir., 1975); Saccamani v. Robert Reiser & Company, Inc., 348 F.Supp. 514 (D.C.Pa., 1972); Coulter v. Sears, Roebuck and Co., 426 F.2d 1315 (5th Cir., 1970); Benn v. Linden Crane Co., 326 F.Supp. 995 (E.D.Pa., 1971); Scafati v. Bayerische Motoren Werke AG, 53 F.R.D. 256 (W.D.Pa., 1971).

While the petitioner, INA, adopts the reasoning of the District Court opinions in this case, it should be noted that the District Court felt jurisdiction would have been proper, except for a single, 1964 6th Circuit decision. The District Court stated:

> "By way of explanation of our partial summary judgment of September 7, 1977, may we state that we felt the trend showed that jurisdiction would have been proper except for the Velandra case; although Velandra probably should no longer stand, we

> as a District Court are not empowered to overrule it. Even plaintiff, in its present memorandum, admits that Velandra is an obstacle, albeit a 'dated milestone.' We are inviting the Sixth Circuit to really look closely at their approach to long arm statutes. It was, and is, a close question. . . ." (Petition for Certiorari, A21-A22 (emphasis ours)

III. JURISDICTION OVER ERMA IS PLAINLY CORRECT UNDER KENTUCKY LAW.

It would appear axiomatic that Kentucky statutes mean what Kentucky Appellate Courts say they mean.

In construing Kentucky's Long Arm Statute, KRS 454.210, the Kentucky Court of Appeals (then the intermediate appellate court) in Volvo of America Corp. v. Wells, Ky.App., 551 S.W.2d 826 (1977), was faced with upholding jurisdiction over a West Virginia retailer and two other foreign distributors on a breach of warranty claim on a Volvo

automobile. In upholding jurisdiction as to all three, the Court relied upon the analysis in Eyerly Aircraft Co, v. Killian, 414 F.2d 591 (5th Cir., 1969) and Keckler v. Brookwood Country Club, 248 F.Supp. 645, 649 (N.D.Ill., 1965). In Volvo of America Corp., supra, at 828 the Kentucky Court of Appeals quotes with approval from those two cases the following:

> "In the case of Eyerly Aircraft Company v. Killian, 414 F.2d 591 (1969) the Fifth Circuit upheld the Texas long arm statute in a suit where a child was injured at a carnival on a ride manufactured by Eyerly Aircraft Company in Oregon and sold in Chicago. The Company had no direct contact with the state of Texas. The Court held that considering the manufacturer had reason to know or expect that its product would be brought into the state of Texas that it was sufficient to support the Texas long arm jurisdiction over the manufacturer. In this Opinion it is stated that 'What is essential purposefully avails itself of the privilege of conducting activities within the forum state, thus

involving the benefits and protections of its laws.' The Court further stated that this result (upholding in personam jurisdiction) obtains where the manufacturer has elected to distribute his wares through independent wholesalers instead of through its own corporate apparatus so that it is only very indirectly responsible for the product reaching the injured consumer. The present trend is to take the next logical step and hold that a corporation is answerable where it introduces its product into the stream of interstate commerce if it had reason to know or expect that its product would be brought into the state where an injury occurred. Also it is stated 'where a defendant does business of such volume or with such a pattern of product distribution, that he should reasonably anticipate that his product may be ultimately used in any state, he has done the act required for the exercise of jurisdiction by the state where the injured user resides. Furthermore, the court citing Keckler v. Brookwood Country Club, 248 F.Supp. 645, 649 (N.D.Ill.1965) states:

"'When a manufacturer voluntarily chooses to sell his product in a way in which it will be resold from dealer to dealer, transferred from hand to hand and transported from state to state, he cannot reasonably claim that he is surprised at being

> held to answer in any state for the damage the product causes. Nor can he deny the substantial interest of the injured person's state in providing a convenient forum for its citizens.'
>
> "It was not unreasonable for the trial court to hold that the section of the statute above quoted applied to the defendants-appellants in this case. . . ." (emphasis ours)

Petitioner seeks to argue that Volvo of America Corp., supra, is bad Kentucky law. Whether the Federal Courts agree with it, or disagree with it as an interpretation of Kentucky law, is not a pertinent inquiry. The U. S. District Court, sitting in diversity, must follow it. Erie R. Co. v. Thompkins, 304 U.S. 64, 82 L.Ed. 1188. This applies to the analysis placed upon a statute by the highest state appellate court that has considered it. Fidelity Union Trust Co. v. Field, 311 U.S. 169, 178, 179; 85 L.Ed. 109, 113; 61 S.Ct. 176; reh'r. den.

311 U.S. 730

INA argues that the Sixth Circuit should have followed the Kentucky Intermediate Appellate Court decision in Tube Turns Division of Chemetron Corp. v. Patterson Company, Inc., Ky.App., 562 S.W.2d 99 (1978). It is worthy of note that Tube Turns Division, etc., supra, cites the Sixth Circuit decision, Davis H. Elliott Co., Inc. v. Caribbean Utilities Co., Ltd., et al, 513 F.2d 1176 (6th Cir., 1975) with approval, for the very point Poyner in the very present case advances -- KRS 454.210 was intended to extend to the limits of due process. Tube Turns Division, etc., supra, recognized this rule, but held under the facts of that case due process would not allow the exercise of jurisdiction over the defendant therein. Tube Turns

Division, etc., supra, is readily distinguishable from the present case on the very grounds stated by the Kentucky Court of Appeals:

> ". . . Unlike the nonresident seller who seeks to distribute its products within the forum state, the nonresident buyer enjoys no particular privilege or protection in purchasing products from a resident seller." (Ky. App., 562 S.W.2d 99)

The defendant in Tube Turns, supra, was a Colorado buyer. Here, on the other hand, Erma was a foreign manufacturer-seller who had actively sought to maximize its trade throughout this country and thereby necessarily including Kentucky. The "stream of commerce" line of decisions with respect to manufacturers amenability to long arm statutes, does not make distant purchasers subject to the jurisidiction of the manufacturer's residence. It works the

other way around. In Tube Turns, supra, the Colorado buyer had been solicited in Colorado by the Kentucky seller. This case simply has zero application to the present facts.

KRS 454.210 extends to the limits of due process. Davis H. Elliott Co., Inc. v. Caribbean Utilities Co., Ltd., supra; L'enfant, "Jurisdiction over Nonresidents, 64 Kentucky Law Journal 357, at 360; Ford Motor Credit Company v. Nantz, Ky., 516 S.W.2d 840, 842 (1974); Volvo of America Corp. v. Wells, supra.

IV. THE STATUTORY LAW OF GERMANY DOES NOT DICTATE THE POWER OR PROPER PROCESS OF AN AMERICAN FEDERAL COURT.

Federal Rule of Civil Procedure 4(i) "Alternate Provisions for Service in a Foreign Country" provides:

> "(i) Manner. When the Federal or State law referred to in subdivision (e) of this Rule authorizes service

> upon a party not an inhabitant of or found within the State in which the District Court is held, and service is to be effected upon the party in a foreign country, it is also sufficient if service of the summons and complaint is made:. . . (or) (d) By any form of mail, requiring a signed receipt, to be addressed and dispatched by the Clerk of the Court to the party to be served; . . ."

This is precisely what was done in the present case. Supreme Court Rule 19 in setting forth the considerations governing review on certiorari does not include certiorari as a method for seeking a change in the Federal Civil Rules. That is what INA appears to request.

As rather cogently stated by the Ninth Circuit in Duple Motor Bodies Ltd. v. Hollingsworth, 417 F.2d 231, 236 (9th Cir., 1969):

> "Nor do we share appellant's concern that we are here in an area of international, and not simply interstate, commerce. Problems of

> full faith and credit do indeed exist and enforcement in England of any judgment appellees may secure in Hawaii may well prove difficult if the views of English courts do not coincide with ours as to what is fair and just and in the best interests of foreign trade. This does not, however, relieve us of our obligation to deal with these problems in the light of the requirements of the Constitution of the United States as we view them." (emphasis ours)

CONCLUSION

The Sixth Circuit Court of Appeals' decision in the instant case is thorough, well-reasoned and needs no review. The District Court's opinion was obviously written with equal care. While the District Court's decision was adverse to respondents, that same Court literally invited the Sixth Circuit to hold for the respondents.

The eloquent appeal by petitioner, INA, for review based upon due process considerations has one fatal flaw. It

ignores this Court's language in a decision rendered six months ago. As succinctly stated by this Court in World-Wide Volkswagen v. Woodson, supra: ". . . The forum state does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State." This is precisely what we have here. Petitioner seems to argue that some sort of respondeat superior, or master-servant relationship must be shown between the manufacturer and the distributor of its goods to uphold jurisdiction over the manufacturer. In the modern world of international commerce, this is unrealistic and unfair. As noted by this

Court if the manufacturer serves "directly or indirectly" the market where its defective product causes an injury, it is answerable there." As noted in McGee v. International Life Ins. Co., 355 U.S. 220, 2 L.Ed.2d 223, 226, 78 S.Ct. 199 (1957), also to be considered in determining the limits of due process is the hardship it would place upon the affected consumer from having to travel to the defendant's residence to litigate the claim. The result the petitioner seeks would force a severely injured Kentucky resident to pursue Erma only in the Courts of the Federal Republic of West Germany. With a corporation which has actively sought to maximize its trade in the United States, and what better market in the world could there be for cheap 22 caliber handguns, this is an

untenable conclusion.

For the foregoing reasons, it is respectfully requested that the Petition for Certiorari filed on behalf of Insurance Company of North America be denied.

Respectfully submitted,

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By _____
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Attorneys for Respondent,
Joe Terry Poyner

CERTIFICATION

I hereby certify that three copies of this Response have been served upon all parties required to be served by Rule 33 of this Court by mailing the same, first class postage prepaid, as follows: Earle T. Shoup, Citizens Bank Building, P. O. Box 930, Paducah, Kentucky 42001, attorney for petitioner. Erma Werke, GMBH, 8060 Dachau, Johann-Ziegler-Str. 13/15, West Germany.

_____